IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 267 of 1984

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARSHOTTAM VIRJI PATEL & 1 - Appellant(s)
Versus
HARIJAN RAMJI RUDA & 3 - Defendant(s)

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Appearance :

MR RAJNI H MEHTA for Appellant(s) : 1 - 2.
MR SP DAVE for Defendant(s) : 1 - 2.
MR MD PANDYA for Defendant(s) : 3,
None for Defendant(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 18/04/2007

ORAL JUDGMENT

1. The short facts of the case appear to be that on 17.6.1980 at 4 p.m., near Village Shantipara on

Veraval-Junagadh Highway, when the claimant was proceeding from Chorward to village Supasi in his rickshaw bearing GTW 4530, one motor truck bearing No.GTY 5204 was driven in rash and negligent manner and with an excessive speed the driver of the said truck lost control over the vehicle and the truck went off wrong side and dashed with the rickshaw of the claimant resulting into the accident and injuries to the claimant. The claimant filed Claim Petition No.265 of 1985 before the Tribunal for the amount of Rs.1 lac. The Tribunal after considering the evidence on record below issue No.1 found that the driver of the truck was fully responsible for the accident and did not attribute any contributory negligence to the claimant and awarded the compensation of Rs.24,800/- together with interest at the rate of 6% and it is under these circumstances the present appeal before this Court.

2. Heard Mr.Parikh for Mr.Mehta, learned Counsel for the appellant, Mr.Sandeep Bhat for Mr.Dave, learned Counsel for respondents No.1 and 2 –

original claimants, and Mr.M.D.Pandya, learned Counsel for respondent No.3.

3. The only contention raised on behalf of the appellant by Mr.Parikh is that the Tribunal has not attributed any contributory negligence to the claimant, who was driving rickshaw. He submitted that the very Tribunal in Claim Petition preferred by the passenger of rickshaw being MACP No.101 of 1981 with MACP No.102 of 1981 for the very accident, attributed contributory negligence of 50% to the driver of the rickshaw and he submitted that the said decision dated 19.3.1983 passed by the very Tribunal in MACP No.101 of 1981 on the aspects of contributory negligence was binding to the Tribunal and, therefore, the Tribunal could not have taken a different view than the view taken for contributory negligence for the driver of rickshaw – claimant herein. He relied upon the decision of this Court in the case of "**United India Insurance Co. Ltd. v. Laljibhai Hamirbhai and Ors.", reported in 2007(1) GLR, 633** and contended that the principles of res judicata

operates in the subsequent petition to the Tribunal on the issue of negligence and, therefore, he submitted that the Tribunal has committed error and the appeal deserves to be allowed to that extent. He also submitted that the rickshaw was also insured by the Respondent No.3 Insurance Company and, therefore, the liability could not be fastened by the Tribunal upon the appellant on the basis of 100% negligence on the driver of the truck.

4. The record and proceedings of the Tribunal does not show that neither the decision of the Tribunal dated 19.3.1983 in MACP No.101 of 1981 was produced before the Tribunal, nor such a contention on the aspects of its earlier decision by the Tribunal was raised before the Tribunal. Therefore, as such if such a contention was not raised, nor was it brought to the notice of the Tribunal by either side, including the appellant herein, the judgement and award of the Tribunal cannot be faulted on the ground of lapse on the part of either side to bring it to the notice of the Tribunal.

5. However, the matter does not end there and the reason being that appeal is a continuous proceedings to the proceedings of the Tribunal. It appears from the copy of the judgement dated 19.3.1983 of the Tribunal in MACP No.101 of 1981 shows that while deciding the aspects of Issue No.1, the finding of the Tribunal is that both the drivers of the vehicles were rash and negligent in driving the vehicles, which includes the driver of rickshaw as well as the driver of the truck. If the said finding is considered in view of the above referred decision of this Court in case of "**United India Insurance Company Limited" (supra)**, it can be said that the principles of res judicata were applicable to the finding of the Tribunal on the aspects of contributory negligence as was decided by it in the earlier decision in MACP No.101 of 1981. Therefore, such a contention, if not, raised before the Tribunal, can be considered by this Court in the appeal proceedings. It further appears from the judgement of the Tribunal in MACP No.101 of 1981

that there is no clear finding of the Tribunal for attributing the liability separately based on the contributory negligence, nor does it appear from the said judgement that the Tribunal recorded clear finding of a particular percentage of contributory negligence by the driver of the truck or by the driver of the rickshaw and it appears that the only finding of the Tribunal is that the drivers of both the vehicles were negligent in driving the vehicles.

6. The perusal of the record and proceedings and more particularly the purshis/declaration at Ex.63 filed by the claimant, who was the driver of the rickshaw dated 31.3.1983 shows that the declaration was given on account of the liability of the claimant for that extent. Therefore, as against the claim of Rs.1 lac, since there was also contributory negligence of the driver of the rickshaw, who himself claimed the compensation, he voluntarily accepted his liability to proportionately and reduced the claim to Rs.24,800/-. The said purshis was accepted by the Tribunal and, therefore, in view

of the said purshis at Ex.63, the Tribunal had to decide the question of liability for the extent qua the driver, owner and the Insurance Company of the other vehicle, namely the truck. Therefore, it appears that the Tribunal recorded the finding while assessing the liability to that extent for the negligence of the driver of the truck. Therefore, in view of the aforesaid peculiar facts and circumstances that the claimant reduced the claim by accepting the negligence proportionately and the Tribunal was to decide the liability to that extent for the remaining amount, it cannot be said that the finding of the Tribunal was contradictory to its earlier decision in Claim Petition No.101 of 1981. The aforesaid being the position, the said decision upon which the reliance is placed by Mr.Parikh is of no help to the appellant.

7. It may also be recorded that even otherwise also the principal claim was of Rs.1 lac and as observed herein above since the claimant himself was driver, he reduced the amount of claim and having accepted the proportionate liability and

restricted the claim to Rs.24,800/-, which is less than 50% the claim amount, therefore, even if the question of contributory negligence is considered on the basis of 50% by the driver of each vehicle, then also the claim amount would be approximately would be Rs.50,000/- qua the vehicle of the truck owner and as against the same the Tribunal has awarded the amount of Rs.24,800/- as the compensation. Therefore, the net effect of the contention, even if considered and examined, would not make any difference in the outcome of the decision of the Tribunal.

8. In view of the above, the appeal fails. Hence, the same is dismissed. Record and proceedings be returned to the Tribunal.

18.4.2007 **(Jayant Patel, J.)**

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